United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-1550

B

P/5

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1550

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

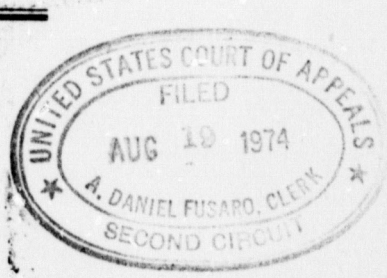
—v.—

CARMINE TRAMUNTI, JOHN GAMBA, et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT JOHN GAMBA



ROBERT B. FISKE, JR.
ARTHUR F. GOLDEN
Attorneys for Defendant-Appellant John Gamba
1 Chase Manhattan Plaza
New York, New York 10005
Tel.: (212) HA 2-3400

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,	:	
Plaintiff-Appellee,	:	
-against-	:	Docket No. 74-1550
CARMINE TRAMUNTI, JOHN GAMBA, et al.,	:	
Defendants-Appellants.	:	

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - -

BRIEF FOR DEFENDANT-APPELLANT JOHN GAMBA

Introductory Statement

John Gamba, a defendant in this case, appeals from the judgment of conviction entered in the United States District Court for the Southern District of New York on April 22, 1974 after a trial before Honorable Kevin T. Duffy and a jury for willfully, intentionally and knowingly conspiring to receive, conceal, buy, sell, distribute and possess with intent to distribute various narcotic drugs (heroin and cocaine) in violation of

Sections 173, 174, 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

Statement Of Issues Presented For Review

The issues on this appeal are:

(1) Whether the District Court erred in denying the requests of defense counsel that the prospective jurors be examined during the voir dire as to whether any of their immediate family or close friends were narcotics users or addicts;

(2) Whether the District Court erred in denying a challenge for cause to a juror who, after the jury had been empaneled but before the trial began, spontaneously disclosed that his stepson was an addict; and

(3) Whether the District Court erred in denying Mr. Gamba's motion for a directed verdict of acquittal because there was no evidence to establish either Gamba's intention to participate in or knowledge of a conspiracy of the scope alleged in the indictment--both

of which are prerequisites to conviction.*

Statement Of The Case

1. Background

The first count of the indictment charged thirty-two individuals with knowing, willful and intentional participation in a conspiracy to violate various federal narcotics laws. In addition, certain of the defendants were charged in twenty-nine other counts of the indictment with specific individual substantive violations of those laws. The only charge against Mr. Gamba was the charge in the first count that he knowingly, willfully and intentionally participated in the alleged conspiracy.

In January 1974 trial of eighteen of the defendants named in the indictment was held and resulted in a verdict of guilty with respect to fifteen of those defendants including Mr. Gamba. Mr. Gamba's motion for a directed verdict of acquittal was denied by the District Court.

---

* In an effort to avoid presenting repetitious papers to this Court, defendant Gamba has not separately briefed all of the points which he asserts may constitute error. This brief is directed at what he believes to be the major errcrs affecting his conviction. Therefore, we join in those issues raised by the other appellants insofar as they may be applicable to him.

For the convenience of the Court, after all of the appellants' briefs are filed, we will undertake to submit to the Court a table showing the particular points raised by the various defendants and the portions of the briefs in which they are argued.

2. Selection of the Jury

The selection of the jury in this case took the better part of four days. The voir dire was conducted by the District Court; counsel for the parties were permitted to submit questions to the Trial Court and request that they be put to the prospective jurors.

Pursuant to this procedure a written request was made to the court below to question the prospective jurors concerning narcotics use or addiction by members of the jurors' families or by close friends. (A. J128).* When this request appeared to have escaped the attention of the District Court during the first day of the voir dire, Mr. Lopez--designated by the court to act as lead defense counsel--requested that juror candidates "be asked if any close friends or immediate family have ever had any problems of narcotics addiction or narcotics use." (A. J126). The District Judge refused to question the panel about that subject stating:

---

* Citations to (A.) are to pages of the joint appendix as numbered for transferral to this Court. Due to the existence of duplicative page numbers the various parts of the appendix have been assigned prefix letters--e.g., "J" for the jury selection process, "T" for the trial.

"THE COURT: We have to ask so many questions, expose so much of these jurors' personal lives, I don't believe we should get into that kind of situation at all. I asked them all whether they know of anything that might affect their service as a juror. I just feel that that is enough." (A. J128).

The next morning, before the process of jury selection was resumed, Mr. Gamba's court-assigned trial attorney (Mr. King) renewed the defense request that the voir dire include an inquiry with regard to the possibility of relationships between prospective jurors and narcotics addicts or users:

"I believe, your Honor, that Mr. Lopez at my suggestion yesterday asked your Honor to question the jury whether any of their children were addicts or users and I think you refused to put the question to them. On giving the matter thought overnight I feel that's of great import and I specifically would like to ask your Honor to put the question to the jury specifically: 'Do any of you have children or relatives who are users or addicts of drugs?'" (A. J166).

Mr. King clearly stated to the court the justification and need for the proposed inquiry--that any juror with a relative who is addicted to narcotics would be highly prejudiced.

"And may I say, Judge, that I feel that any of the jurors who do have such relatives would have a very bitter prejudice, regardless of what they tell your Honor, against these defendants which would, I think, interfere with their careful deliberation in the jury room, and I respectfully ask your Honor to reconsider your refusal to ask that question." (A. J166-67).

The District Court, after noting that the suggested area of

inquiry had been brought to its attention on two previous occasions, denied Mr. King's request:

> "I believe that we go into the background of these jurors quite a bit and at the end you will note I have asked the jurors generally if there is anything that they feel which they should bring to the court's attention which might prejudice them from rendering a fair and impartial verdict." (A. J167).

The process of selecting the jury continued, during the course of which the District Court asked only one general question of the prospective jurors relating to narcotics:

> "Is there any juror here who would have any bias one way or the other, for or against the defendant, for or against the government, because it is a narcotics case?" (A. J.369).

This question elicited no response from the proposed jurors. Shortly thereafter the selection process was completed and the jury was sworn. (A. J388).

Sometime after the jury was sworn, but before court adjourned for the day (and before the trial began), juror number ten (Mr. Pasierb) sought permission to approach the bench. At the side bar Mr. Pasierb informed the court that the stepson of his common-law wife was a narcotics addict.* Pasierb also told the court that he was separated from this

---

* Pasierb stated that he was separated from his wife and that "while I was separated I married a widow. She had a stepson. His name is John Hawkey. He became an addict while we were separated." (A. J406).

wife and that the stepson had become an addict during the separation period. (A. J406-07).

The District Judge ascertained that Mr. Pasierb was not the natural father of the child and confirmed the fact of Pasierb's "separation" from his wife. The following exchange then took place between the court and Mr. Pasierb:

"Q Do you think that this would in any way affect you?

A I never thought of it that way.

Q Do you think it would affect you?

A No, I don't think so." (A. J407).

The issues of Mr. Pasierb's marital status and relationship to this narcotics addict were further confused by the following:

"Q [Court] Do you live alone?

A Yes. I live in the same apartment. My wife lives there too. And I got a couple of inlaws.

Q Can you get somebody to put together a bag for you?

A Yes, yes.

Q All right go back up and take your place." (A. J407).

The District Court did not further clarify Pasierb's family situation or explore to any further degree his relationship with his narcotics addict stepson.

Mr. Lopez, on behalf of all defense counsel, immediately objected to Pasierb's continued presence on the jury and requested that a challenge for cause be approved:

> "We are dealing here with a narcotic case and there is a relationship here. The juror himself voluntarily brought it out, giving some significance to the fact that although he has never thought about it before, he is thinking about it now. I think, your Honor, that this juror should be replaced with one of the alternates at this time." (A. J407-08).

Mr. Lopez sought to remind the court of the previous attempts by the defense to have prospective jurors examined with respect to such relationships:

> "MR. LOPEZ: The only thing I would like to point out is that the defense has on repeated occasions--
>
> THE COURT: I am aware of that." (A. J408).

After hearing the Government's objection to the replacement of Mr. Pasierb on the jury, the District Court denied the challenge for cause. Mr. Pasierb remained on the jury that convicted the defendants.*

---

* There is no way of knowing how many of the other jurors had family relationships or close friendships with narcotics addicts.

3. The Evidence Against Gamba

The evidence relating to John Gamba accounts for very little of the more than 5500 page trial transcript. Only three witnesses, John Barnaba, Harry Pannirello and Pasquale Provitera, mentioned John Gamba in their testimony.

John Barnaba's testimony regarding Gamba did not link Gamba to any narcotics transactions or to the alleged conspiracy. Barnaba stated that he saw Gamba talk to Pat Dilacio on the street (A. T1454-55). He also mentioned Gamba as being present at a party for Frank Pugliese at Pugliese's house before Pugliese started serving a jail sentence. Also present at the party were Joseph LaSalata, Harry Pannirello and Dilacio. Pugliese asked Barnaba (out of the presence of Gamba) for his opinion about using Gamba as a "stash" for narcotics. Barnaba replied that he did not know Gamba that well (A. T1460-61). These events appear to have taken place in or around November 1971. On cross-examination Barnaba stated that he had never had any narcotics transactions with Gamba; that he had met him only at a few social functions (A. T1551-52).

Harry Pannirello began his narcotics activities in 1970 as a "stash" and courier for Frank Pugliese and, when Pugliese went to jail in 1971, succeeded to part of his heroin wholesale business (A. T2119-28, T2152-55).

Pannirello testified that he was also present at the party at Pugliese's house referred to by Barnaba and stated that Pugliese's mother-in-law and wife were also in attendance (A. T2168-69). Pannirello testified that he used Gamba's house to store approximately one kilogram of heroin in November or December of 1971. He stated that Pugliese had said that he had previously used Gamba for this purpose (A. T2175-76), and that when he first brought heroin to Gamba he saw some heroin in Gamba's house in a suitcase (A. T2177). He stated that he paid Gamba $300 a week for approximately 4-5 months to act as a "stash" (A. T2178).

Pannirello stated that he first met Gamba through Frank Pugliese (A. T2412) and that no narcotics were involved at that meeting (A. T2414). He said the arrangement to store narcotics at Gamba's house was made in or around October 1971; he did not remember where it was made or when it was specifically made with Gamba (A. T2415-16). He stated that the arrangement with Gamba lasted 4 to 5 months (A. T2420).

Pannirello testified that in March 1972 he stored one kilogram of heroin at Gamba's house (A. T2188), and that in April or May of 1972 he purchased 4-1/2 kilograms of heroin from Carmine Pugliese (Frank's brother) and kept it

at Gamba's house (A. T2202).

Pasquale Provitera testified that he visited Gamba's house four or five times (A. T3061) and on four occasions picked up packages of narcotics from Gamba (A. T2982-83, T2986-87, T2989) and on one of those occasions saw Harry Pannirello mixing heroin at Gamba's apartment and Gamba sealing the bags of heroin (A. T2985-86). These events appear to have taken place in April and May of 1972. (A. T3057, T3066).

There is no other evidence in the record concerning John Gamba.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATUTORY PROVISIONS INVOLVED

Title 21 U.S.C. § 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Title 21 U.S.C. § 841. Prohibited acts A--Unlawful acts

(a) Except as authorized by this subchapter, it shall be unalawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

* * * *

Penalties

(b) Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1) (A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

* * * *

ARGUMENT

POINT I

THE REFUSAL OF THE DISTRICT COURT TO QUESTION PROSPECTIVE JURORS ABOUT THEIR RELATIONSHIPS WITH NARCOTICS ADDICTS DENIED THE DEFENSE EFFECTIVE USE OF ITS CHALLENGES

The right of an accused in all criminal cases to trial by an impartial jury is guaranteed by the Sixth Amendment to the United States Constitution. U.S. Const. Amend. VI. To qualify as an impartial juror the candidate must be indifferent to the parties in the case and be both willing and able to base his verdict solely on the evidence developed at trial. Irvin v. Dowd, 366 U.S. 717, 722 (1961).

In order to facilitate the selection of an impartial jury both the accused and the government have the right to challenge juror candidates for cause if a substantial possibility of bias or prejudice can be shown. United States v. Burr, 25 Fed. Cas. 49, 50 (Cir. Ct. Va. 1807) (J. Marshall, C.J.).

In addition, in recognition of the fact that good cause for not accepting a prospective juror cannot always be clearly demonstrated, both the accused and the government are granted a number of peremptory challenges. Swain

v. Alabama, 380 U.S. 202, 218-220 (1965).

The Supreme Court has repeatedly stated that the peremptory challenge is one of the most important rights of the accused, and that denial or impairment of an accused's right to freely utilize the peremptory challenges afforded him is reversible error--regardless of whether any prejudice to the accused is shown. E.g., Swain v. Alabama, 380 U.S. 202, 219 (1965); Pointer v. United States, 151 U.S. 396, 408 (1894).

It is indisputable that a sufficiently extensive voir dire is essential to the proper exercise of both peremptory challenges and challenges for cause. Report of the Judicial Conference Comm. on the Operation of the Jury System on Voir Dire Procedures, 3 (October 1970). Given this vital constitutional purpose of the voir dire--to serve as a predicate for the exercise of challenges--it must serve the function of probing the jurors' minds

> "concerning their precognitions, predilections, experiences and any other matters which may peculiarly bear upon their qualifications and competency to serve fairly and impartially in the particular case." Brundage v. United States, 365 F.2d 616, 618 (10th Cir. 1966).

Although the District Courts have broad discretion as to the questions to be asked during the voir dire, the exercise of that discretion must preserve the accused's constitutional

rights, and is therefore subject to the essential demands of fairness. Aldridge v. United States, 283 U.S. 308, 310 (1931).

In order to comply with the demands of fairness, it is essential to explore the background and attitudes of prospective jurors in sufficient detail both to discover actual bias--providing the basis for a challenge for cause--and to permit the intelligent exercise of peremptory challenges. United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973).

The courts have consistently recognized that certain relationships or experiences of juror candidates are inherently inconsistent with the constitutionally required impartiality of jurors, notwithstanding any protestations by the juror in question to the contrary. See, e.g., Bailey v. United States, 53 F.2d 982 (5th Cir. 1931). In such situations "the law cautiously incapacitates him from serving on the jury because it suspects prejudice, because in general persons in a similar situation would feel prejudice". United States v. Burr, 25 Fed. Cas. 49, 50 (Cir. Ct. Va. 1807) (J. Marshall, C.J.) (relationship to party or adversary). Within this concept, it has been recognized that people who have been victims of crimes similar to that for which the defendant they are to judge stands accused

are unfit to serve on an impartial jury. In United States ex rel. DeVita v. McCorkle, 248 F.2d 1 (3rd Cir.), cert. denied, 355 U.S. 873 (1957), the Third Circuit granted a new trial in an armed robbery-murder case when, subsequent to trial, it was discovered that a juror had failed to disclose that he had been a recent robbery victim. In so doing that court stated that the victim of a crime:

> ". . . is not likely to forget or forgive nor treat lightly or even fairly similar conduct in others. This is a normal human reaction following customary behavior, expected and anticipated by the background of experience." 248 F.2d at 8.

Failure to inquire of a juror as to whether he has been the victim of a crime has been held to be reversible error--even where the appellant is unable to show that, in fact, any member of the jury was the victim of a crime. As stated in United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973):

> "The focus is exclusively on whether the procedure used for testing impartiality created a reasonable assurance that prejudice would be discovered if present." 472 F.2d at 367.

In United States v. Poole, 450 F.2d 1082 (3rd Cir. 1971), a bank robbery case, the defendants asked the court to inquire if prospective jurors had ever been the victims of a robbery or other crime. The District Court denied the request. The Third Circuit reversed the conviction--notwith-

standing a failure to show prejudice--because of the "denial of the opportunity to probe for possible bias."

> "It is true that in the instant case we do not know that any member of the jury which convicted Finkley had been a prior crime victim. However, the absence of such evidence cannot overcome appellant's contention. It would indeed be disingenuous to argue that Finkley is now bound by the absence of proof of that which he was prevented from proving." 450 F.2d at 1083 n.2.

In the present case, the District Court, in apparent recognition of the fact that the victim of a similar crime could not qualify as an impartial juror, did question juror candidates with regard to their own prior experiences as victims of crime. (E.g., A. J371). His error, we submit, lay in not recognizing that a juror who might have a close relationship with a narcotics addict would suffer the same bias as if he had been a victim himself.

Narcotics abuse is both a prevalent problem and a highly emotional issue in metropolitan centers such as New York. It is inconceivable that one who has watched and suffered as the life of a close friend or relative was destroyed by this plague would be able to sit in fair and impartial judgment of a defendant in any narcotics case, especially one of the scope and nature involved here.

In Virgin Islands v. Bodle, 427 F.2d 532 (3rd Cir. 1970), the court reversed a conviction for rape when it was

subsequently discovered that a juror had a sister who had been raped and murdered six years earlier. Although no question of an improperly limited voir dire--and thus no deprivation of the right to challenge jurors--existed in Bodle, the court felt compelled to grant a new trial because of the "substantial possibility that Blyden [the juror] was not capable of objective determination of the facts of the case."* 427 F.2d at 534.

Similarly, in Jackson v. United States, 395 F.2d 615 (D.C. Cir. 1968), where the defendant was convicted of murder in a love triangle slaying, the presence on the jury of a juror who was alleged to have had an affair with a woman who was subsequently murdered by her husband was deemed sufficient to warrant a new trial. Although the juror denied he had participated in such an affair. the court felt that the ambiguity of his own situation created a presumption of prejudice which could not permit him to sit in judgment of the defendant. The court reached its result despite the lack of any attempt by the court or by defense counsel during the voir dire to probe this possible source of prejudice.

---

* Nor was there any allegation that the juror withheld information. The general nature of the voir dire questions were not sufficient to prompt the juror to disclose the relationship.

The rationale for disqualifying relatives and close friends of rape or murder victims is equally applicable here. In many ways the close friend or relative of the victim of certain crimes experiences the same emotional suffering (although perhaps to a different degree) as the true victim. In a very real sense such close friends or relatives, although probably not viewing themselves as such, are also victims of the crime. A parent or sibling of a narcotics addict, who may have suffered financially to assist his relative and who may have watched the addict turn to crime or prostitution to support the habit and perhaps die of the "disease", would be equally as prejudiced against the cause of his relative's torment as would be a rape or murder victim's spouse, parent or sibling. In either example the relative of the victim could not be trusted to sit as an impartial juror in a case involving the crime that had so affected his own life. Regardless of any claimed impartiality by the juror, the law, as Chief Justice Marshall noted so long ago, must not trust him if the constitutional guarantee of an impartial jury is to survive.

In the present case the District Court asked prospective jurors only two general questions which could in any way relate to the source of prejudice at issue here: whether jurors were biased for or against the government

"because it is a narcotics case" (A. J369); and, even more general, whether there existed "anything that they feel which they should bring to the court's attention which might prejudice them from rendering a fair and impartial verdict." (A. J167). Such general questions are insufficient to protect the constitutional rights of the accused. See, e.g., Ham v. South Carolina, 409 U.S. 524 (1973).

In United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973), the District Court had refused to pose certain specific questions to prospective jurors, asking only questions such as: whether "they could keep an open mind until time to reach a verdict;" and "whether there was any reason they could not be fair and impartial jurors in this case." 472 F.2d at 366.

The general nature of the voir dire was held to be insufficient to probe for actual bias or to facilitate use of peremptory challenges. It was clear to the Seventh Circuit that the general questions posed by the District Court had not provided the assurance that any actual bias would be discovered:

> "The government's position must rest upon an assumption that a general question to the group whether there is any reason they could not be fair and impartial can be relied on to produce a disclosure of any disqualifying state of mind. We do not believe that a

prospective juror is so alert to his own prejudices. Thus it is essential to explore the backgrounds and attitudes of the jurors to some extent in order to discover actual bias, or cause." 472 F.2d at 367. (Emphasis supplied).

The Seventh Circuit also emphasized that specific inquiries into legitimate areas of inquiry suggested by the defense must be made if the right to peremptory challenges is not to become an empty one, 472 F.2d at 368:

> "[N]ot . . . all questions must relate directly to the indictment or pleas in the case. Some questions may appear tangential to the trial but are actually so integral to the citizen juror's view of the case, especially one with publicly controversial issues, that they must be explored."

Although the Dellinger case, which dealt with the trial of the "Chicago Seven", may have been more publicly controversial than the massive narcotics conspiracy charged in this case, the prejudice that defense counsel in this case sought to uncover was arguably much more personal and therefore much stronger than the possible political bias that may have existed in Dellinger.

In United States v. Lewin, 467 F.2d 1132 (7th Cir. 1972), the Seventh Circuit reversed a jury verdict based on the generality of the voir dire where the District Judge had refused to ask specific questions (concerning possible associations of jurors) designed to feret out prejudice

and facilitate the defense's use of its peremptories. Lewin is especially significant here because the court specifically rejected the sufficiency of one of the two general questions used by the District Court in this case:

> "We do not consider the court's obligation to let counsel, on request, get at underlying bases reflecting on bias, prejudice or other suspect factors to be discharged by general questions such as, 'Is there any reason you cannot fairly and impartially try this case?' This obligation particularly would not seem to be discharged by general direct confrontation questions on human characteristics that most people are reluctant to admit they possess." 467 F.2d at 1138. (Emphasis supplied).

The facts in the present case vividly demonstrate two things. First, that at least one juror was a party to a relationship with a narcotics addict--clearly showing that defense counsel were not pursuing a speculative will-o-the-wisp; and second, that the general questions posed by the District Court were completely inadequate to bring about the disclosure of such a relationship--even from a juror who was not seeking to hide it. As a result of the inadequacy of the voir dire at least one, and possibly more than one juror who would surely have been challenged peremptorily (if a challenge for cause was not sustained) sat on the jury that convicted these defendants.

The basis for the District Court's decision not to ask the single specific question suggested by the defense

appears to have been that:

> "We have to ask so many questions, expose so much of these jurors' personal lives, I don't believe we should get into that kind of situation at all." (A. J128).

A similar argument directed against inquiry into racial or religious prejudices was categorically rejected by the Supreme Court more than forty years ago:

> "We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute." Aldridge v. United States, 283 U.S. 308, 315 (1931).

Furthermore, the questioning of individual jurors about relationships with narcotics addicts could have been performed at the side bar, out of the hearing of other jurors--a method specifically suggested by the Judicial Conference--thus avoiding any embarrassment to the juror in question. Indeed, the limited discussion with the juror Pasierb about his addict stepson was held at the side bar.

In sum, given the nature of this case, the scope of the voir dire, the clearly and repeatedly expressed desire and reasons of defense counsel to probe the area in question, the minimal effect that such inquiry would have had on the length of the voir dire, and the facts in the case which demonstrate the legitimacy of defense counsel's con-

cerns, there has not been--and cannot be--any satisfactory explanation for the District Court's refusal to question the jurors specifically on this subject. The scope of the voir dire was insufficient to allow proper investigation for actual bias and seriously interfered with the right of the defendants to exercise their peremptory challenges in a free and unrestrained manner, in contravention of one of the defendants' most important constitutional rights. The vindication of that right requires that the judgment of conviction be reversed and a new trial be granted.

POINT II

THE DENIAL OF THE CHALLENGE FOR CAUSE TO THE JUROR PASIERB CONSTITUTES REVERSIBLE ERROR

As a result of the District Court's improper limitation of the voir dire the defense counsel had no way of knowing whether any of the prospective jurors had any relationships to narcotics addicts. Despite this serious obstacle to the intelligent exercise of peremptory challenges and to the legitimate effort to probe for bias, the defense did exercise the challenges allotted to it and the jury was sworn.

It was only after the jury had been sworn (but before the trial had started) that juror number ten, Mr. Pasierb, approached the bench and voluntarily informed the court of his narcotics addict stepson. (A. J406). Although the District Court did conduct a brief examination of Mr. Pasierb, apparently directed at clarifying his relationship to the addict, that examination did nothing but add to the confusion. In response to the District Court's questions Mr. Pasierb testified as follows:

> "I am separated and while I was separated I married a widow. She had a stepson. His name is John Hawkey. He became an addict while we were separated." (A. J406).

Asked whether he lived alone, Pasierb replied:

> "Yes. I live in the same apartment. My wife lives there too. And I got a couple of in-laws." (A. J407).

The District Judge then told Pasierb to resume his place on the jury and made no further effort either to ascertain possible bias on the part of Pasierb or to obtain intelligible answers to the questions that had already been asked.

Defense counsel immediately challenged for cause Mr. Pasierb's continued presence on the jury, reminding the court that the defense had repeatedly sought to make inquiry with regard to such relationships and emphasizing that Pasierb's relationship with his addict stepson was obviously on his mind since he had volunteered the information without any prompting. Notwithstanding that the replacement of Mr. Pasierb on the jury by one of the alternate jurors would in no way have prejudiced the Government or delayed the start of the trial, the Government objected to the removal of Pasierb and the District Court denied the challenge. (A. J408).

Courts of Appeals for two other circuits have recently held that juror relationships similar to the one in question here raise a presumption of prejudice sufficient to require a new trial--even in the absence of any objection to swearing the juror or any attempt by the defense

to elicit information about the relationship. Virgin Islands v. Bodle, 427 F.2d 532 (3rd Cir. 1970); Jackson v. United States, 395 F.2d 615 (D.C. Cir. 1968). In the present case the defense sought both to question all jurors about the possible existence of such relationships and to have Mr. Pasierb removed from the jury. Both of these efforts were frustrated by the actions of the District Court. Nor can any responsibility for the ambiguous record with regard to Mr. Pasierb's relationship to his narcotics addict stepson, and possible bias, be placed on the defendants. As the Third Circuit noted in United States v. Poole, 450 F.2d 1082 (3rd Cir. 1971):

> "It would indeed be disingenuous to argue that Finkley [the defendant] is now bound by the absence of proof of that which he was prevented from proving." 450 F.2d at 1083 n.2.

In this case it is an undisputed fact that Pasierb's stepson was (and may still be) a narcotics addict. The statements by Pasierb regarding his domestic situation were contradictory and the court made no attempt to clarify them. There was no inquiry by the District Court as to the closeness of Pasierb's relationship to his stepson. The court denied the repeated attempts by defense counsel to elicit relevant information in this area. There would have been no prejudice whatsoever to the Government or to the commence-

ment of the trial by replacing Pasierb with an alternate juror. In view of all these facts, prejudice on the part of Pasierb must be presumed, see Jackson v. United States, 395 F.2d 615, 618 (D.C. Cir. 1968), and the denial of the defense's challenge to Pasierb requires that a new trial be granted.

POINT III

THE LACK OF ANY EVIDENCE AS TO GAMBA'S KNOWLEDGE OF AND INTENTION TO PARTICIPATE IN A CONSPIRACY OF THE SCOPE ALLEGED IN THE INDICTMENT MANDATED A DIRECTED VERDICT OF ACQUITTAL

The indictment in this case charged John Gamba and thirty-one other defendants with knowingly, willfully and intentionally agreeing and conspiring to receive, conceal, buy, sell, distribute and possess with intent to distribute heroin and cocaine. The alleged conspiracy was principally located in Bronx, New York, but it was its alleged purpose to effect the distribution of heroin and cocaine in both New York City and Washington, D.C. The evidence against Gamba, read most favorably to the Government, shows only that on three or four occasions during a six-month period in the five years in question here he allowed his apartment to be used as a place to hide heroin. The people he dealt with (Harry Pannirello, Pasquale Provitera, and possibly Frank Pugliese) consisted of what might be termed a lower echelon heroin wholesaler (Pannirello, an alleged subordinate of Frank Pugliese) and his courier assistant (Provitera).

Criminal liability of a defendant for conspiracy depends upon his knowledge and acceptance of the purposes

and scope of the conspiracy, and his agreement to support them. He cannot be liable for purposes of which he was not aware, and even if aware of them he is not so liable unless he agrees to and does support them. E.g., United States v. Borelli, 336 F.2d 376 (2d Cir. 1964), cert. denied sub nom. Cinquegrano v. United States, 379 U.S. 960 (1965). By imputing to Gamba the "knowledge" that others--whose identity he did not know--were vertically connected to the illegal activities in which he participated it is possible to argue that he "conspired" with those people to effect the distribution of certain quantities of heroin. Such an enterprise could properly be deemed to be within the scope and purposes of his conspiracy as he must have understood them. Although Gamba dealt only with Pannirello and Provitera (and possibly Frank Pugliese), such an imputation of knowledge could link Gamba to Pannirello's alleged primary supplier of heroin--Joseph DiNapoli--and to Pannirello's customers. The evidence as to Gamba's participation cannot, as a matter of law, support any inference of knowledge on his part of the broader conspiracy charged by the Government.

The Government contended that the proof would show that all of the defendants were engaged in a single large conspiracy, which existed for at least the five-year period from 1969 to 1973, to distribute heroin and cocaine (A. T10-11). The Government claimed that the conspiracy was, in effect, a unified large illegal business enterprise (A. T13).

Joseph DiNapoli and Louis Inglese (and to a lesser degree Dominick Lessa) were described as the primary sources of supply for the main wholesale distributors, each with their various assistants and subordinates. (A. T17-18). Carmine Tramunti was alleged to be the financier of Inglese's activities. (A. T21-22). The only alleged link between the so-called primary sources of supply is the claim that Vincent Papa (who was not on trial here) was the ultimate supplier of the drugs distributed by all the defendants in this case.

The record does not indicate any cooperative effort among the primary suppliers; rather, there appears to have been competition among them for customers. One such customer--John Barnaba--a primary wholesale distributor who allegedly dealt with more than one primary supplier was allegedly taken to task by Inglese for dealing with his competitor Lessa. (A. T1335-36). Thus, rather than the unified criminal enterprise the Government claimed was charged and would be proved, the most that may be said based on the record in this case is that a complex multifaceted criminal network existed. This network, containing as it did both cooperative and competitive forces, was by no means monolithic.

The application of the law of criminal conspiracy to an ongoing complex criminal enterprise is at best difficult

and has produced decisions, both in this Circuit and elsewhere, that are difficult to reconcile. In order to present to this Court what we believe to be the proper application of the law of criminal conspiracy to the facts in this case relating to John Gamba, the following analysis attempts to set forth the logical standard against which to test the evidence against Gamba. We respectfully submit that this standard, rather than any mechanical formula or rigid conspiracy model, should be used to measure Gamba's guilt or innocence of the conspiracy charged.*

In United States v. Falcone, 311 U.S. 205 (1940), the respondents, together with a number of other defendants, were indicted for a conspiracy for the illicit distillation of alcohol. The respondents were not the principal conspirators (the distillers) but were jobbers who had supplied one or more of the distillers with sugar and other supplies under such circumstances as to indicate their knowledge that such supplies would be used for illicit distilling purposes. It was not shown, however, that they had knowledge

---

* Although the cases to be discussed include the oft-cited Falcone and Kotteakos decisions, we do not contend that the alleged conspiracy in this case is structurally equivalent to the conspiracies in either those cases or any other case. Those cases (and others such as United States v. Bruno, 105 F.2d 921 (2d Cir.), rev'd on other grounds, 308 U.S. 287 (1939), are discussed here only to demonstrate what we contend is the standard against which the evidence concerning Gamba should be measured.

of a conspiracy among the distillers themselves. The Government argued that they were guilty because they had by their sales, aided and abetted the distiller-conspirators with knowledge of the unlawful purposes to which such supplies were to be put.

The Supreme Court, unanimously affirming the opinion of this Court, ruled that notwithstanding such knowledge, and notwithstanding the fact that the respondents might have been guilty of conspiring with the individual distillers to whom such sales were made, they were not guilty under the over-all conspiracy charge. The Supreme Court pointed out that the essence of conspiracy is knowledge of the scope of the conspiracy, and agreement. 311 U.S. at 208-210.

In Direct Sales Co. v. United States, 319 U.S. 703 (1943), the Supreme Court, in a narcotics case, distinguished Falcone because of the differing levels of evidence in the two cases, but reaffirmed the principal of Falcone: that without knowledge, intent cannot exist. 319 U.S. at 711

The Falcone case involved one of the major continuing criminal enterprises of its time--the production and distribution of bootleg liquor. There, as here, the organization allegedly involved was complex and the criminal ven-

ture lasted a considerable period of time. Falcone also presented a conspiracy pattern somewhat similar to that alleged in this case, in that it involved a central or core group of conspirators and also various other parties alleged to have had unlawful transactions with certain of the core figures. In Falcone this Court (109 F.2d 579), speaking through Judge Learned Hand, affirmed the convictions of the core conspirators but held that the Government had not proved knowledge and participation by the non-core defendants in the broad conspiracy alleged.*

United States v. Lekacos, 151 F.2d 170 (2d Cir. 1945), rev'd sub nom. Kotteakos v. United States, 328 U.S. 750 (1946), also involved an ongoing criminal enterprise--that of obtaining government insured loans by means of fraudulent applications. The defendants included central figures involved in the entire enterprise and other defendants who knowingly participated in certain illegally obtained loans, and who, in general terms, knew of--but had no financial interest in--other similar transactions.

---

* We recognize that this Court has previously stated that Falcone should be limited to its facts, United States v. Tramaglino, 197 F.2d 928 (2d Cir.) cert. denied, 344 U.S. 864 (1952). However, in view of the similarity between the two "industries" involved, and the sound reasoning in Falcone, limiting the application of that decision solely to non-narcotics cases seems unsound.

This Court affirmed the conspiracy conviction of the defendants but noted an error of the District Judge in applying the law of criminal conspiracy:

> "He was apparently misled by an erroneous understanding of the rule that, when anyone joins an existing conspiracy, he takes it over as it is, and becomes a party to it in its earlier phases, and that the declarations of other conspirators, even though made before he has entered, are competent against him. What he failed to remember was that to bring this rule into operation it is not enough that, when one joins with another in a criminal venture, he knows that his confederate is engaged in other criminal undertakings with other persons, even though they be of the same general nature. The acts and declarations of confederates, past or future, are never competent against a party except in so far as they are steps in furtherance of a purpose common to him and them." 151 F.2d at 172. (Emphasis supplied)

The Supreme Court reversed the Lekacos case because of the failure of this Court to properly apply the standard it had articulated so well. 328 U.S. 750 (1946). Kotteakos is a classic example of what has been termed the hub-spokes or circle model conspiracy.

Perhaps the clearest general statement by this Court as to the standard governing criminal liability for conspiracy was that of Judge Learned Hand in United States v. Andolschek, 142 F.2d 503, 507 (2d Cir. 1944):

> "It is true that at times courts have spoken as though, if A. makes a criminal agreement with B., he becomes a party to any conspiracy into which B. may enter, or

> may have entered, with third persons. This is of course an error: the scope of the agreement actually made always measures the conspiracy, and the fact that B. engages in a conspiracy with others is as irrelevant as that he engages in any other crime. It is true that a party to a conspiracy need not know the identity, or even the number, of his confederates; when he embarks upon a criminal venture of indefinite outline, he takes his chances as to its content and membership, so be it that they fall within the common purposes as he understands them. Nevertheless, he must be aware of those purposes, must accept them and their implications, if he is to be charged with what others may do in execution of them." (Emphasis supplied).

The activity involved in a particular case and the particular facts of that case will permit different inferences to be drawn with regard to the scope of the alleged conspirator's agreement--his knowledge and intent. Nevertheless, it is still his understanding of the scope of the conspiracy that determines his liability.

Although the Andolschek standard has been given general application by this Court, it appears that a different method of analysis has been utilized by this and other courts in narcotics conspiracy cases. The foundation upon which this line of narcotics cases is built is United States v. Bruno, 105 F.2d 921 (2d Cir.), rev'd on other grounds, 308 U.S. 287 (1939). That case dealt with a long-standing enterprise involving the smuggling of narcotics into the Port of New York and its distribution through various

channels to addicts in New York City, Texas and Louisiana.

The appellants in Bruno contended that there were multiple conspiracies, rather than the one charged in the indictment. Appellant Bruno alleged that there were sixteen conspiracies in addition to the one he engaged in; appellant Iacono claimed at least ten different groups of conspirators and argued that the sale of narcotics by a defendant ended his conspiratorial involvement with regard to those narcotics. United States v. Bruno, supra, Briefs for appellants, passim. In the face of such absurd claims, this Court correctly held that a chain existed from smuggler to middleman to retailer because, given the nature of the enterprise, each level of conspirator necessarily knew of the existence and involvement of the other levels and that they were necessary to the accomplishment of his criminal objectives.

However, the Court also held that the diverse groups of retailers--who had not known of each other's existence--were also conspiring with each other. The Court based this part of its holding on the assumption that a retailer knew he was an essential link in the chain of distribution and that there may well have been other such links. The Court does not appear to have given any consideration to the actual understanding of any retailer or group of retailers as to the scope of the conspiracy. In view of the Court's concession that "there was apparently no privity

between the two groups of retailers", 105 F.2d at 923, and the concession by the Government "that some of the conspirators may not have comprehended its [the conspiracy's] entire scope", United States v. Bruno, supra, Brief for the United States at 20, we respectfully submit that this latter part of Bruno was improperly decided.

Since Bruno, the majority of narcotics conspiracy cases in this Circuit (and elsewhere) have routinely followed Bruno and have held that virtually any narcotics conspiracy fits the so-called chain-link model, with the result that anyone who can be linked to members of the conspiracy is deemed a willful participant in a single overall conspiracy. Thus, in United States v. Tramaglino, 197 F.2d 929 (2d Cir.), cert. denied, 344 U.S. 864 (1952), the Court, faced with a narcotics conspiracy case that bore a great resemblance to a circle conspiracy, relied on Bruno to find two wholly independent suppliers guilty as co-conspirators because they happened to sell marijuana to the same buying syndicate. The Court did not consider either supplier's actual understanding of the scope of his agreement.

The primary difficulty with the teaching of Bruno and some of its progeny is that it is virtually impossible for any defendant to know or to limit the scope of his conspiratorial activities. Thus an individual who conspires to distribute a small amount of heroin in

New York may be "joining" a massive national (or international) conspiracy he did not know existed and would never have voluntarily participated in. The logic that one who conspires to distribute heroin "knows" of the existence of other vertical links in the chain of distribution (e.g., producers, smugglers, importers, wholesalers, etc.) who are necessarily part of the scope of his agreement does not support an indefinite horizontal definition of his conspiracy.

In the present case John Gamba arguably conspired with a lower echelon New York heroin wholesaler. Putting aside the question of his knowledge of the qualitative and quantitative scope of the total enterprise (which the record does not touch on), and attributing to him all possible knowledge as to persons vertically related to him, there is no indication that Gamba had any idea that his "conspiracy" had anything to do with the distribution of cocaine. If John Gamba's lack of knowledge of the factual scope of his "conspiracy" is not sufficient to prove he was not a member of any such broad conspiracy, the sound legal principles of Andolschek, Falcone and Lekacos-Kotteakos--i.e., the element of criminal intent--will have been excised from narcotics conspiracy cases.

A brief example may serve to illustrate the point.

Under the logic of Bruno and certain of its progeny, a college student who purchases marijuana for himself and several friends from a wholesaler of marijuana and other drugs, arguably could be joining an international heroin conspiracy he would never knowingly participate in. If Gamba's connection to the "core-chain", assuming he was so connected, exposes him to liability for all of its narcotics activities, the college student would seem equally liable.

In order to avoid some of the harsher results that might follow in Bruno's wake, this Court has developed a so-called single transaction exception to conspiracy liability, i.e., participation in a single, isolated transaction is insufficient to infer participation in a continuing conspiracy. E.g., United States v. Stromberg, 268 F.2d 256, 267-68 (2d Cir.), cert. denied, 361 U.S. 863 (1959). This exception to the straight chain analysis of Bruno and its progeny, while providing needed relief, is logically unsupportable insofar as it is based on the number of transactions involved rather than the scope of the accused's agreement.* The requirement that criminal intent be proved cannot be met either by rigid application of the chain model theory of conspiracy or by any arithmetic

---

* In Stromberg, the Court held a single transaction insufficient to link one defendant to the conspiracy, but held two or more transactions sufficient as to two others. 268 F.2d at 267-68.

formula concerning the number of transactions a defendant participates in.

In United States v. Borelli, 336 F.2d 376 (2d Cir. 1964), cert. denied sub nom. Cinquegrano v. United States, 379 U.S. 960 (1965), this Court, speaking through Judge Friendly, specifically recognized the dangers of rigid application of chain model analysis to narcotics conspiracy cases. The Court, in reversing a jury verdict, noted that what could be a continuing conspiracy for some might not be so regarded by the different groups with whom they dealt:

> "Thus, however, reasonable the so-called presumption of continuity may be as to all the participants of a conspiracy which intends a single act, such as robbing a bank, or even as to the core of a conspiracy to import and resell narcotics, its force is diminished as to the outer links--buyers indifferent to their sources of supply and turning from one source to another, and suppliers equally indifferent to the identity of their customers." 336 F.2d at 384.

After noting the difficulty in "applying the seventeenth century notion of conspiracy . . . to . . . the conduct of an illegal business over a period of years", the Court reaffirmed the need to establish the intent of each defendant:

> "[T]he gist of the offense remains the agreement, and it is therefore essential to determine what kind of agreement existed as to each defendant." 336 F.2d at 384.

The Court specifically questioned the soundness of that part of the Bruno holding which linked the two independent retailer groups--each arguably unaware of the other's existence--in a single conspiracy. 336 F.2d at 383 n.2.

Although Borelli does not abandon the chain analysis, it indicates recognition by this Court that the chain model may not be applicable to every narcotics enterprise, or to all defendants in an alleged conspiracy. There may well exist several "chains," related to each other only by common links. Moreover, the suitability of the chain, or any other analytical model, decreases as the period of time involved and the rotation of "personnel" increases. Whether, in extremely complex and long-term illegal enterprises, the "chain" may ultimately assume a hub-spokes configuration, as suggested by Borelli, 336 F.2d at 383, is irrevelant. What is important is the implicit recognition by the Borelli Court that, between the simple chain model on the one hand and the Kotteakos circle configuration on the other, there exists a continuum of possible configurations. In all cases liability must be determined by assessing the accused's understanding of the scope of his individual agreement--his criminal intent.

We do not contend that the alleged illegal enterprise in the present case is structurally identical to that of Kotteakos. However, the Supreme Court's caveat

in that case that the use of mass conspiracy charges should be carefully limited is relevant to a proper evaluation of the status of John Gamba in this case. The Kotteakos Court stated:

> "When many conspire, they invite mass trial by their conduct. Even so, the proceedings are exceptional to our tradition and call for use of every safeguard to individualize each defendant in his relation to the mass. Wholly different is it with those who join together with only a few, though many others may be doing the same and though some of them may line up with more than one group.
>
> Criminal they may be, but it is not the criminality of mass conspiracy." 328 U.S. at 773. (Emphasis supplied).

Even giving effect to all of the implications of knowledge and intent that may be drawn against Gamba regarding those vertically related to him, it would be illogical--and contrary to the sound principles of Andolschek--to hold him liable for other criminal acts which his imputed conspirators may have engaged in which were not part of his purpose.

The acceptance by this Court of our position that there was a failure of proof against Gamba in this case does not--and should not--mean that he (or others in the future) could not be tried for those conspiratorial activities and substantive violations of law realistically attributable to him. It would, however, help to restore criminal intent to its proper position in complex conspiracy cases.

In this case there is absolutely no evidence in the record to indicate that John Gamba had any awareness or understanding of the scope of the multifaceted enterprise he supposedly intentionally adopted as his own. There is no evidence that he knew, even in general terms, the size of the enterprise or the products in which it traded. Thus there was no basis in the record from which to infer that Gamba ever willfully, intentionally and knowingly joined the venture whose existence the Government sought to prove in this case and his motion for a directed verdict of acquittal should have been granted. See American Tobacco Co. v. United States, 147 F.2d 93, 112 (6th Cir. 1944), aff'd, 328 U.S. 781 (1946).

CONCLUSION

The judgment of conviction should be reversed and a directed verdict of acquittal should be entered as to the defendant John Gamba.

Dated: New York, New York
August 19, 1974

Respectfully submitted,

ROBERT B. FISKE, JR.
ARTHUR F. GOLDEN
Attorneys for Defendant-
Appellant John Gamba
1 Chase Manhattan Plaza
New York, New York 10005
Tel.: (212) HA 2-3400

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

PLAINTIFF-APPELLEE,

-Vs-

CARMINE TRAMUNTI, JOHN GAMBA, ET AL.

DEFENDANTS-APPELLANTS.

74-1550

AFFIDAVIT OF SERVICE ON PERSONS IN CHARGE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ANDREW J CUSACK being duly sworn deposes and says that he is over the age of 21 years and is employed by ~~Davis Polk & Wardwell~~ ROBERT B. FISHER, JR., attorneys for JOHN GAMBA

who have their place of business at No. 1 Chase Manhattan Plaza, Borough of Manhattan, City and County of New York; that on the 16th day of AUGUST, 1974, he served ~~the~~ Two copies of annexed

BRIEF FOR DEFENDANT-APPELLANT JOHN GAMBA

on: (1) GEORGE DAVID ROSENBAUM
51 CHAMBERS STREET
NEW YORK, NEW YORK

(2) ROBERT LEIGHTON
15 PARK ROW
NEW YORK, NEW YORK

(3) GARY SUNDEN
401 BROADWAY
NEW YORK, NEW YORK

(4) NANCY ROSNER
401 BROADWAY
NEW YORK, NEW YORK

(5) IVAN FISHER
401 BROADWAY, NEW YORK

(6) EDWARD PANZER
299 BROADWAY
NEW YORK, NEW YORK

(7) HARRY POLLAK
299 BROADWAY
NEW YORK, NEW YORK

by delivering Two copies of the same to and leaving the same with the persons in charge of said offices, ~~said attorneys being absent therefrom at the time of said services~~.

Sworn to before me this 16th :
day of AUGUST , 1974. : Andrew J. Cusack

William J. Lind

WILLIAM J. LIND, Notary Public
State of New York, No. 41-7555730
Qualified in Queens County
Certificate Filed in New York County
Commission Expires March 30, 1976

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

PLAINTIFF-APPELLEE,

-vs-

CARMINE TRAMUNTI, JOHN GAMBA, ET AL,

DEFENDANTS-APPELLANTS.

74-1550

AFFIDAVIT OF SERVICE IN OFFICE LETTER DROP OR BOX

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ANDREW J CUSACK being duly sworn deposes and says that he is over the age of 21 years and is employed by ~~Davis Polk & Wardwell, attorneys~~ for ROBERT B. FISKE, JR ATTORNEY for JOHN GAMBA

who have their place of business at No. 1 Chase Manhattan Plaza, Borough of Manhattan, City and County of New York; that on the 16th day of AUGUST, 1974, he served the annexed ~~two copies~~ of

BRIEF FOR DEFENDANT-APPELLANT JOHN GAMBA

on:

HERBERT SIEGEL
17 JOHN STREET
NEW YORK, NEW YORK

by depositing ~~two~~ a true copies of the same, enclosed in a sealed wrapper directed to said attorneys, in the letter drop ~~or box of~~, and accessible from without, of said attorneys office at the address set out under ~~their~~ his name; and that said office was not open at the time of such service.

Sworn to before me this 16th
day of AUGUST, 1974.

Andrew J Cusack

William J. Lind

WILLIAM J. LIND, Notary Public
State of New York, No. 41-7595738
Qualified in Queens County
Certificate Filed in New York County
Commission Expires March 30, 1976

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

- -x

United States,

Plaintiff,

Carmine Tramunti, et al.,

Defendants.

AFFIDAVIT OF SERVICE BY MAIL

74-1550

- -x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Michael I. Adler being duly sworn deposes and says that he is over the age of 21 years and is employed by Davis Polk & Wardwell attorneys for Robert B. Fiske, Jr.

John Gamba who have their place of business at No. 1 Chase Manhattan Plaza, Borough of Manhattan, City and County of New York; that on the 16th day of August , 1974, he served the annexed brief for defendant-appellant John Gamba

on: Michael C. Dowd
120-10 Queens Boulevard
Kew Gardens, New York 11415

by depositing true copies of the same securely enclosed in postpaid wrappers in a Post Office Box regularly maintained by the United States Postal Service at No. 1.Chase Manhattan Plaza in the City and County of New York, directed to said attorney(s) at the address(es) set out under his name(s); this being the address(es) within the state designated by him for that purpose upon the preceding papers in this action.

Sworn to before me this 16th :
day of August , 1974. :
: Michael I. Adler

Andrew J. Cusack

ANDREW J. CUSACK, Notary Public,
State of New York, No. 41-0835385
Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 1975

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

- x

United States,

Plaintiff,

Carmine Tramunti, et al.,

Defendants.

- x

AFFIDAVIT OF SERVICE ON PERSONS IN CHARGE

74-1550

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Michael I. Adler being duly sworn, deposes and says that he is over the age of 21 years and is employed by ~~[redacted]~~ attorneys for John Gamba
Robert B. Fiske, Jr.

who have their place of business at No. 1 Chase Manhattan Plaza, Borough of Manhattan, City and County of New York; that on the 16th day of August , 1974 , he served the annexed brief for the defendant-appellant John Gamba

on: Robert L. Ellis
17 East 63rd Street
New York, NY 10021

Martin Jay Siegel
250 West 57th Street
New York, NY 10019

Frank A. Lopez
31 Smith Street
Brooklyn, NY 11201

Theodore Rosenberg
31 Smith Street
Brooklyn, NY 11201

by delivering a copy of the same to and leaving the same with the person in charge of said office, said attorneys being absent therefrom at the time of said service.

Sworn to before me this 16th:
day of August , 1974 .: Michael I. Adler

Andrew J. Cusack

ANDREW J. CUSACK, Notary Public,
State of New York, No. 41-0835385
Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 1975